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Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-889

Lillian V. Couch,
Petitioner

v.

United States and Edward F. Jennings, Etc.,
Respondents

SUPPLEMENTAL BRIEF ON THE MERITS

ON WRIT OF CERTIORARI
TO THE UNITED STATES
COURT OF APPEALS
FOR THE FOURTH CIRCUIT

PETITION FOR CERTIORARI FILED
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IN THE

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No. 71-889

Lillian V. Couch,
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SUPPLEMENTAL BRIEF ON THE MERITS FOR PETITIONER

OPINIONS BELOW

The opinion of the Circuit Court of Appeals for the 4th Circuit is set forth at page A-3 of the Single Appendix. The opinion of the District Court for the Western District of Virginia is set forth at page A-6 of the original brief for the petitioner.

JURISDICTION

The jurisdiction of the Court is invoked under 28 U. S. C. Section 1254. The petition for certiorari was filed within the ninety day period fixed by law from the judgment of the Circuit Court of Appeals for the Fourth Circuit.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Set forth on page 2 of the original brief of the petitioner.

QUESTIONS PRESENTED

Set forth at page 4 of the original brief of the petitioner.

STATEMENT OF THE CASE

Set forth at page 5 of the original brief of the petitioner.

SUMMARY OF ARGUMENT

A recently reported case, *United States of America* and *Richard Thalman, Special Agent, IRS vs. Harold H. Tsukuno,* Respondent and *Ken Eto, Intervenor,* 72-2 USTC 9631 (D. Ct., N. Dist. Ill) has been decided on a fact situation virtually identical to the case at bar. In its decision the District Court held that the records of a taxpayer though in the possession of his accountant were still protected from the subpoena power of the IRS by the privilege of the taxpayer to assert the 5th Amendment. The petitioner contends that the above cited holding is the only result that will give full force and effect to the broad mandate of the 5th Amendment.

The Government relies on clearly distinguishable cases to premise its argument that documents must be in the actual possession of the owner to be afforded the protection of the 5th Amendment. It relies on *Johnson v. United States,* 228 U. S. 457; *Perlman v. United States,* 274 U. S. 7; and on *Burdeau v. McDowell,* 256 U. S. 465. In *Johnson* (supra) both title and possession of the documents had left the individual asserting the privilege when he conveyed them to the trustee in bankruptcy. While in *Perlman* (supra), the person asserting the privilege had published the contents of the documents when he made them his evidence at a public trial on a patent matter. It could also be argued that ownership of the documents had passed to the lower court

when the evidence was introduced. Finally, in *Burdeau* (supra) the compulsion asserted on the individual claiming the privilege was not that of the government but that of a private individual. None of the cases cited by the government are similar to the one at bar where it is apparent that the petitioner retained ownership but not possession while never making public the contents of the documents. On the contrary, the government has consistently shown possession as well as title in someone other than the individual asserting the privilege, a crucial distinction.

The petitioner, Lillian V. Couch, respectfully submits that the government has not made a strong enough case to destroy substantial rights granted to her by the 5th Amendment.

ARGUMENT

The petitioner, Lillian V. Couch, respectfully draws the attention of the Court to a decision of significance reported during the interim period after the filing of her brief and prior to the oral argument of the case at bar. The District Court for the Northern District of Illinois rendered an opinion in the case of *United States of America and Richard Thalman, Special Agent, IRS, Petitioners v. Harold H. Tsukuno, Respondent and Ken Eto, Intervenor, 72-2 U. S. T. C. 9631* (N. D. Ill., 1972), which case has a substantially similar fact situation to that of the present case. There Eto, the taxpayer, retained Tsukuno, an accountant, to prepare the former's tax returns. During the course of an investigation into the tax liabilities of Eto, Thalman, Special Agent, issued a summons to Tsukuno pursuant to 26 U. S. C. Section 7402 (b) and Section 7604 (a) ordering him to produce all of the

records of Eto in his possession for the use of the Internal Revenue Service. The records in the possession of Tsukuno were of two types: (1) the work papers developed and used by Tsukuno in preparation of Eto's returns and (2) the personal books and records of Eto used by Tsukuno.

As in the case at bar, the taxpayer intervened in the action brought by the IRS to enforce the summons and asserted his rights under the 5th amendment as well as alleging a privilege for communications between an accountant and his client. The assertion of an accountant —client privilege is not an issue in the case at bar, although it is interesting to note that the District Court found that there was no such federally recognized privilege.

In its consideration of whether or not the taxpayer's privilege against self-incrimination embraced personal records no longer in his possession, the District Court scrutinized the holding of this Court in Donaldson v United States [71-1 USTC paragraph 9173] 400 U. S. 517 (1971). The District Court reinterated that Donaldson was not;

> ". . . a case in which the subpoena seeks to obtain records *of the taxpayer* in the hands of his attorney or accountant which the courts have deemed the same as if they were in the possession of the taxpayer himself. See *Reisman v. Caplin* [64-1 USTC paragraph 9202], 375 U. S. 440, 84 S. Ct 508, 11 L. Ed. 459, and this court's recent decision in *Stuart v. United States,* et al., 5 Cir., 416 F. 2d 459; . . ." 418 F. 2d 1213, 1214 (5th Cir. 1969) [emphasis in original]."

The District Court went on to say that:

> "The clear implication of the statements above which distinguish *Donaldson* from cases such as the the instant one where the records sought belong to the taxpayer, or in which he had some "proprietary interest," is that the taxpayer may assert his Fifth Amendment privilege to prevent their production by his lawyer or accountant." 72-2 USTC paragraph 9631 at 85,507

Your petitioner, Lillian V. Couch, contends that the District Court was correct in its interpretation of *Donaldson* which is the same interpretation prayed for by her in her original brief to this Court. The District Court said in refusing to enforce the IRS subpoena as to Eto's personal records in the possession of Tsukano;

> "It also seems clear that a person's Fifth Amendment rights are not so lacking in substance that they disappear if a government agency can locate and subject to process records temporarily out of his possession."

The petitioner contends that the above is a necessary interpretation of *Donaldson* as well as the result dictated by the broad mandate of the 5th Amendment.

Although the government has argued that no privilege attaches to documents out of the possession of the owner, the cases cited for that proposition are all easily distinguishable from the case at bar. In *Johnson v. United States* 228 U. S. 456, the records of a bankrupt who sought to invoke the 5th Amendment had been conveyed to the trustee. Title and possession to the records had left the bankrupt. Mr. Justice Holmes stated (id at 458)

> "A party is privileged from producing evidence but not from its production . . . it is held that a criminal cannot protect himself by getting legal title to corporate books. But the converse proposition is by no means true that he may keep the protection from the introduction of documentary evidence that he would have had while he retained it after *title and possession* have gone to someone else" (italics added)

Likewise, *Perlman v. United States,* 247 U. S. 7, is inappropriate to the issue here in question. There Perlman had delivered to an Equity Court the exhibits and records in question for use as his evidence in a patent suit. The records had become part of the public record. Obviously the privilege had been lost by a communication of the substance of the documents to the public at large. It is equally true that title to the evidence had shifted from Perlman to the Court. Finally, in *Burdeau v. McDowell,* 256 U. S. 465, the reliance of the government is misplaced. The holding of that case is questionable. However, even as the opinion is there set forth it is not relevant to the case at bar. There a 3rd party broke into X's office and stole papers belonging to X. The papers then came into the possession of the government which sought to use them as the basis of a prosecution against X. X raised the question of his 5th amendment privilege but the Court ruled it was inapplicable saying the 5th amendment protects one only from the compulsion and acts of his government, not the compulsion and acts inflicted by a fellow citizen. In the case at bar, it is the compulsion inflicted on Mrs. Couch by the government that is the question, not that by a fellow citizen. The case is inapplicable as a precedent for the present question. Mr. Justice Holmes and Mr. Justice Brandeis in a strong dissent both stated that the results disturbed their

notions of fair play and decency while noting that records sought would be protected if in the possession of X.

In the cases mentioned above, *United States of America and Richard Thalman v. Harold E. Tsukuno and Ken Eto.* (supra) *Donaldson v. United States* (supra), *Johnson v. United States* (supra), *Perlman v. United States* (supra), the basis of the decisions rendered has been either the location of title to the documents or the knowing publication of the contents of the documents. None of the cases have been decided solely on the basis of physical location. In the case at bar the government has not demonstrated the relevance of the decisions it cites to the present fact situation. It has not been alleged that Mrs. Couch, petitioner, has forfeited or transferred her title. She has not been shown to have published the contents of the records so as to destroy her privilege. The government has demonstrated at most a change of location which is not sufficient in and of itself to cause a forfeiture of substantial rights.

The government in citing *Colton v. United States,* 306 F 2d 633 (CA 2), cert. denied 371 U. S. 951 implicitedly recognizes the merits of Mrs. Couch's contentions. Among other issues, attorney Colton had in his possession records of his clients, the Matters, which the government sought, the Court saying on that point,

> "Moreover, if a proper showing is made Colton will be able to raise the Matters' privilege against self-incrimination as basis for refusing to produce any independently pre-existing records or other documents turned over to the firm by the Matters if the

Matters could have refused to produce them under that privilege."
306 F2 633 at 639. (1)

The petitioner contends that if the protection of the Fifth Amendment is stripped away from her that the consequences will be a serious erosion of the rights of the individual vis a vis the power of the government. Addressing itself to this same situation the holding in *Application of J. M. House*, 144 F. Supp. 95, at 103, said;

> "The zealous prosecution of violations of the criminal laws is the business of the government. The field of taxation represents probably the greatest single area of contact between individuals and the force of the state. A slight invasion of the right against self-incrimination in this field has as great and baleful consequences upon the relations between the individual and the state as does an invasion of that right in the more dramatic areas of public life."

(1) See also *Application of House* 144 F. Supp. 95 (N. D. Calif. 1956). Title of workpapers made by accountant passed to taxpayers. Taxpayers put the documents in the possession of their attorney. The Government sought to obtain the documents from attorney by subpoena. Held that the documents are protected by taxpayer's 5th Amendment privilege as title is in taxpayers although possession is not.

CONCLUSION

In summary your petitioner contends that for the reasons above cited her documents in the possession of her employee are surrounded and protected by her privilege under the 5th Amendment as title has not shifted nor has a publication of the contents been made.

Respectfully submitted,

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